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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DESERT HERITAGE LIMITED PARTNERSHIP, an Arizona limited partnership, Plaintiff/Appellant, v. CITY OF TUCSON, a political subdivision, Defendant/Appellee.	2 CA-CV 2009-0176 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20063789

Honorable John F. Kelly, Judge
Honorable Kenneth Lee, Judge

AFFIRMED

Feulner Dorris & Giordano, PLC
By Gerald F. Giordano, Jr. and George J. Feulner
Tucson
Attorneys for Plaintiff/Appellant

Michael G. Rankin, Tucson City Attorney
By Michael W. L. McCrory
Tucson
Attorneys for Defendant/Appellee

B R A M M E R, Judge.

¶1 Desert Heritage Limited Partnership appeals the trial court's grant of the City of Tucson's motion for summary judgment on Desert Heritage's claim that the City had breached a lease by cancelling it and of the City's motion to dismiss Desert Heritage's claims to recover unamortized tenant improvement costs under the lease. We affirm.

Factual and Procedural Background

¶2 This is the second appeal arising from litigation involving office space that the City leased to be used by its Human Resources Department in a building owned by Desert Heritage ("HR lease" or "the lease"). An addendum to the lease included a cancellation clause that provided the circumstances under which the City could cancel the lease before the end of its term, March 31, 2008. The cancellation clause reads:

> In the event that the Mayor and Counsel of the City of Tucson shall not appropriate sufficient funds for the payment of the rent (as set forth by the Lease) in the adopted budget for the fiscal years subsequent to 2000-2001, then [the City] shall have the right annually upon the anniversary of its lease term, with 90 days prior written notice to [Desert Heritage], to cancel the lease. In such an event, [the City] will immediately pay to [Desert Heritage] the total sum of any unamortized costs for tenant improvements to the demised premises.

¶3 In December 2005, the Mayor and Council adopted a resolution directing the City Manager to "eliminate funding from the annual City budget for outside rental of office space for the City of Tucson Department of Human Resources for fiscal Year 2006-2007." One week later, and at least ninety days before the lease's anniversary date,

the City notified Desert Heritage that it would exercise the lease's cancellation clause, effective April 1, 2005.

¶4 Desert Heritage sued the City, claiming the City had breached the lease by failing to comply with the cancellation clause and by violating the covenant of good faith and fair dealing in exercising that clause. It also sought damages for unpaid rent and unamortized tenant improvement costs. The City moved for partial summary judgment, contending it had complied with the cancellation clause and had not violated the covenant of good faith and fair dealing. The trial court granted that motion.

¶5 After our supreme court issued its opinion in *Deer Valley Unified School District No. 97 v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), the City moved to dismiss the claims for unpaid rent and unamortized tenant improvement costs for failure to comply with A.R.S. § 12-821.01, the notice-of-claim statute. The trial court granted that motion and entered final judgment in favor of the City. Desert Heritage appealed.

¶6 In our decision in that first appeal, based on a section titled "Compliance with Cancellation Clause," we rejected Desert Heritage's arguments that the decision to cancel must have originated with the Mayor and Council, that the City had not complied with the cancellation clause because the December 2005 resolution did not take effect until July 2006, and that to cancel the lease the City needed to prove it lacked sufficient appropriated funds to pay the lease's obligations. We further rejected as irrelevant Desert Heritage's argument that the City's cancellation was "self serving." We concluded "the

trial court did not err in finding that the City had complied with the express terms of the cancellation clause," and affirmed summary judgment with respect to that claim.

¶7 But with respect to Desert Heritage's argument that the City had breached the lease's implied covenant of good faith and fair dealing, we concluded genuine issues of material fact precluded summary judgment. We further stated "we need not address Desert Heritage's argument that, even if cancellation was proper, the City could not cancel the lease until March 2007." We declined to address Desert Heritage's claim for unamortized tenant improvement costs, reasoning that the issue may be rendered moot upon remand. We reversed the summary judgment in the City's favor on Desert Heritage's good faith and fair dealing claim, and remanded the matter to the trial court.

¶8 On remand, Desert Heritage filed a motion for reconsideration of the court's grant of the City's motion for summary judgment on Desert Heritage's cancellation clause claim and its decision granting the City's motion to dismiss Desert Heritage's claim for unamortized tenant improvement costs. The trial court denied the motion. After a bench trial, the court concluded the City had not breached its duty of good faith and fair dealing, and granted judgment in the City's favor. This appeal followed.

Discussion

¶9 As in its first appeal, Desert Heritage asserts the trial court erred in granting the City's motion for summary judgment on Desert Heritage's cancellation clause claim, alleging the effective date of cancellation was March 31, 2007. It argues, contrary to the

City's contention, that we did not decide this issue in the first appeal. Pursuant to the law-of-the-case doctrine, "'if an appellate court has ruled upon a legal question and remanded for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case.'" *Flores v. Cooper Tire & Rubber Co.*, 218 Ariz. 52, ¶ 23, 178 P.3d 1176, 1181 (App. 2008), *quoting Paul R. Peterson Constr., Inc. v. Ariz. State Carpenters Health & Welfare Trust Fund*, 179 Ariz. 474, 478, 880 P.2d 694, 698 (App. 1994). The appellate decision becomes the law of the case on "'the points presented throughout all the subsequent proceedings in the case in both the trial and appellate courts, provided the facts and issues are substantially the same as those on which the first decision rested.'" *Center Bay Gardens, LLC v. City of Tempe City Council*, 214 Ariz. 353, ¶ 17, 153 P.3d 374, 377 (App. 2007), *quoting Ziegler v. Superior Court*, 134 Ariz. 390, 393, 656 P.2d 1251, 1254 (App. 1982). Because the doctrine is one of procedure, rather than substance, *State v. Whelan*, 208 Ariz. 168, ¶ 8, 91 P.3d 1011, 1014 (App. 2004), it is a matter of "'policy and not one of law.'" *Center Bay Gardens*, 214 Ariz. 353, ¶ 17, 153 P.3d at 377, *quoting Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986).

¶10 Although we concluded in our previous decision that "[t]he trial court did not err in finding that the City had complied with the express terms of the cancellation clause," we expressly declined to address Desert Heritage's argument below that "even if cancellation was proper, the City could not cancel the lease until March 2007." It is the

interplay between these two statements that has generated the confusion presently before us. In our previous decision we addressed whether the right to cancel had been triggered under the cancellation clause, and concluded it had. In doing so, we implicitly addressed and decided the date upon which cancellation became effective if the right to cancel was triggered properly and exercised.

¶11 Desert Heritage had argued in the first appeal that the City had failed to comply with the cancellation clause because the December 2005 resolution that eliminated funding for the lease from the budget was not to take effect until July 2006. In addressing this argument, we reasoned that if the City were unable to cancel the lease before the City's budget was adopted in July, and the adopted budget appropriated insufficient funds to fund the lease's obligations, the City would have had the burdens of a lease without the funds to pay its obligations. Further, if the adopted budget had included sufficient funds to pay the lease's obligations, the City then would have breached the lease by cancelling as it did. We thus concluded that Desert Heritage's interpretation of these events "would render the cancellation clause impossible to effectively exercise."

¶12 Desert Heritage's interpretation necessarily would render the cancellation clause a nullity because the City adopts its budget on an annual, rather than biannual, basis. *See* A.R.S. § 42-17105(B) ("The adopted estimates constitutes the budget of the . . . city . . . for the current fiscal year."). Yet, Desert Heritage now reasserts the cancellation clause provided that, at the time the City gave the notice of cancellation, the

City was required to have an "adopted budget" that did not contain sufficient appropriated funds to pay the lease's obligations. Because we implicitly rejected this argument in our previous decision, we conclude, as a matter of policy, that the law-of-the-case doctrine precludes Desert Heritage from raising it again here. *See Flores*, 218 Ariz. 52, ¶ 23, 178 P.3d at 1181. Accordingly, we do not address it further.

¶13 Desert Heritage next asserts the trial court erred in dismissing its claim for those unamortized tenant improvement costs remaining when the lease cancellation became effective. The court had granted the City's motion to dismiss because Desert Heritage's claim notice failed to comply with § 12-821.01(A). Although styled a "motion to dismiss," the City's motion was in effect a motion for summary judgment both because it was filed well after the City filed its answer and also included information outside the pleadings. *See* Ariz. R. Civ. P. 12(b); *Jones v. Cochise County*, 218 Ariz. 372, ¶ 7, 187 P.3d 97, 100 (App. 2008). In reviewing a trial court's ruling on a motion for summary judgment, we determine de novo whether there existed any genuine issues of material fact, viewing the facts in the light most favorable to the nonmoving party. *Prince v. City of Apache Junction*, 185 Ariz. 42, 45, 912 P.2d 47, 49 (App. 1996); *see also* Ariz. R. Civ. P. 56(c). Because the relevant facts here are undisputed, however, we need only determine whether the court properly applied the law. *See Town of Miami v. City of Globe*, 195 Ariz. 176, ¶ 3, 985 P.2d 1035, 1037 (App. 1998) ("'When reviewing a grant of summary judgment on undisputed facts, our role is to determine whether the trial court correctly applied the substantive law to [the] facts.'"), *quoting St. Luke's Health*

Sys. v. State, 180 Ariz. 373, 376, 884 P.2d 259, 262 (App. 1994) (alteration in *Town of Miami*). We review de novo a trial court's determination that a party's claim notice failed to comply with statutory notice requirements. *Jones*, 218 Ariz. 372, ¶ 7, 187 P.3d at 100.

¶14 Section 12-821.01(A) requires, inter alia, that anyone with a claim against a public entity or employee file a notice of that claim within one hundred eighty days after the cause of action accrues. "[A] cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." § 12-821.01(B). The claim must contain "facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed," in addition to stating "a specific amount for which the claim can be settled and the facts supporting that amount." § 12-821.01(A).

¶15 Here, Desert Heritage sent four letters pursuant to § 12-821.01, but only three of them asserted a claim under the lease for remaining unamortized tenant improvement costs. On January 13, 2006, Desert Heritage sent its first notice letter, which did not refer to unamortized tenant improvement costs. Thereafter, on July 12, 2006, Desert Heritage filed its complaint, which included a claim for those costs. On September 6, 2006, nearly two months after Desert Heritage filed its complaint, it sent its second letter, the first in which it claimed unamortized tenant improvement costs. Although that letter contained a specific amount for which the claim could be settled, it

provided no supporting facts. Five months later, on February 5, 2007, Desert Heritage sent a third letter, providing facts supporting a settlement amount, but an amount different than it had requested in the September 6 letter. Desert Heritage sent its fourth and final letter on April 26, 2007, providing yet a different accounting than it had in the February 5 letter.

¶16 In its response to the City's motion to dismiss its claim for unamortized tenant improvement costs, Desert Heritage asserted its claim had not yet accrued because it would be entitled to unamortized tenant improvement costs only if it were determined that the City had cancelled the lease properly—an issue that had been the subject of the first appeal. The trial court rejected this argument, concluding "Desert Heritage knew it had been damaged on April 1, 2006, when the City terminated the lease without immediately paying these costs."

¶17 The trial court thus implicitly determined that Desert Heritage's two claim notices sent on February 5, 2007, and April 27, 2007, were untimely. And, the court concluded the notice Desert Heritage sent on September 6, 2006, did not comply with § 12-821.01 because it "failed to explain the amount claimed by providing an adequate factual foundation to permit the City to evaluate the claim."

¶18 Relying on *Long v. City of Glendale*, 208 Ariz. 319, 93 P.3d 519 (App. 2004), Desert Heritage reasserts its claim had been made timely because the claim did not accrue until Desert Heritage actually realized it had been damaged. Specifically, Desert Heritage argues that its claim for unamortized tenant improvement costs did not accrue

until the trial court determined on June 25, 2009, in its final ruling that is the subject of this appeal, that the City had cancelled the lease properly. Division One of this court in *Long* concluded that information about actions taken by a municipality that is made available at a public meeting could not be imputed to the appellant, who had no actual knowledge he had been damaged. *Id*. ¶¶ 1-2, 6-14. The trial court did not err in concluding the reasoning in *Long* is inapplicable here, given that Desert Heritage plainly had actual knowledge it had been injured when the City terminated the lease without immediately paying the unamortized tenant improvement costs as the lease required.

¶19 A cause of action whose merit is contingent upon the success or failure of another claim begins to accrue for purposes of § 12-821.01, just as any other cause of action does, which is when "the damaged party realizes he or she has been damaged." § 12-821.01(B). To conclude that a party "realizes" such a contingent claim only when it becomes potentially meritorious results in a reading of § 12-821.01 that would require parties to file claim notices after litigation had begun. *See* § 12-821.01(A) (persons with claims against public entity shall file claims within one hundred eighty days "after the cause of action accrues").[1] Such a reading renders meaningless the purpose of § 12-821.01, which is to "'allow the public entity to investigate and assess liability, . . . permit

[1]Highlighting the absurd result it offers, Desert Heritage's argument fails to comport with its own suggested reading of § 12-821.01. Desert Heritage does not assert that it filed claim notices after the litigation began, as its interpretation of § 12-821.01 would require. Rather, it argues that each of its three notices of claim were timely, even though each notice was filed before June 25, 2009—the date Desert Heritage asserts its claim accrued.

the possibility of settlement prior to litigation, and . . . assist the public entity in financial planning and budgeting.'"[2] *Deer Valley*, 214 Ariz. 293, ¶ 6, 152 P.3d at 492 (alteration in *Deer Valley*), *quoting Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, ¶ 9, 144 P.3d 1254, 1256 (2006); *see also Barth v. Cochise County*, 213 Ariz. 59, ¶ 14, 138 P.3d 1186, 1190 (App. 2006) (employee contemplating suing public employer must satisfy § 12-821.01 "before filing a lawsuit"); *Andress v. City of Chandler*, 198 Ariz. 112, ¶¶ 10, 14, 7 P.3d 121, 123-24 (App. 2000) (Section 12-821.01 intended to "provide[] an opportunity to resolve a claim before a lawsuit is ever filed" and court will not interpret it to defeat legislative intent).

¶20 Accordingly, as the trial court correctly concluded, Desert Heritage cannot reasonably assert it did not realize it was damaged when the City canceled the lease effective March 31, 2006, and failed to "immediately pay[]" the unamortized tenant improvement costs as the cancellation clause required. And because the purpose of § 12-821.01 is to permit settlement before litigation, Desert Heritage's September 6 claim notice, filed after it had initiated litigation to recover the improvement costs, was untimely. *See Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) ("[W]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason."). The court did not abuse its discretion in concluding

[2]Although Desert Heritage argues alternatively that the claim accrued on April 27, 2008—"the date the City first stated, contrary to [its] earlier indications . . . , that it would try to avoid paying [the costs]"—this still came after Desert Heritage had filed its complaint stating a cause of action for the unamortized tenant improvement costs.

each of Desert Heritage's claim notices failed to comply with the statutory notice requirements of § 12-821.01, and in dismissing Desert Heritage's claim on that basis.[3]

¶21 Last, the City requests its attorney fees on appeal under the terms of the underlying contract. The lease provides the following in terms of recovery:

> If any action or proceeding is brought by either party against the other pertaining to or arising out of this Lease, the finally prevailing party shall be entitled to recover all costs and expenses, including reasonable attorneys' fees, incurred on account of such action or proceeding.

¶22 Because the City is the "finally prevailing party" in this appeal, we award its reasonable attorney fees incurred in this appeal, pursuant to the City's compliance with Rule 21(c), Ariz. R. Civ. App. P. Accordingly, we need not address the City's request for attorney fees pursuant to Rule 25, Ariz. R. Civ. App. P.

Disposition

¶23 For the foregoing reasons, we reaffirm the trial court's order granting summary judgment in favor of the City on Desert Heritage's cancellation clause claim,

[3]Desert Heritage also argues that it was "led to believe at all times prior to April 4, 2007 that the City was in agreement to pay its unamortized tenant improvement costs." But this does not alter the fact that Desert Heritage's first claim notice demanding unamortized tenant improvement costs was sent after its complaint had been filed and therefore was untimely. And Desert Heritage fails to develop this argument and does not provide citations to the record. We do not address it further. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and part of the record relied on"); *Ritchie v. Krasner*, 211 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (failure to comply with Rule 13(a)(6) can constitute abandonment and waiver of that claim).

and affirm the court's order dismissing Desert Heritage's claim for unamortized tenant improvement costs. The City is awarded its reasonable attorney fees as indicated.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge